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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 08 2005

SRC 03 242 52763

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. According to the petition, the petitioner seeks employment as a therapist. The remainder of the record establishes that the petitioner is a licensed massage therapist and performs craniosacral therapy. Counsel initially indicated that the petitioner qualifies for Schedule A-Group II certification and an exemption from the requirement of a job offer, and thus of a labor certification, in the national interest of the United States. For the reasons discussed below, these two requests are not the same. The director found that the petitioner does not qualify for Schedule A-Group I certification (never requested) and that the position sought does not require an advanced degree. The director does not appear to have considered whether the petitioner qualifies as an alien of exceptional ability as claimed. Finally, due to the petitioner's lack of a degree in his field, the director concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the petitioner qualifies as an alien of exceptional ability who is working nationally in his field. Counsel further asserts that the petitioner's letters demonstrate the relationship between quantum physics and "integrative medicine," a "new science" that "defies logical description." Counsel asserts that this office has recognized the importance of opinions from independent experts and that the petitioner has supplied such opinions.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
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> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
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> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Schedule A Group II

First, we will address the issue of Schedule A, which was not properly addressed by counsel or the director. The director concluded that the petitioner did not qualify under Schedule A Group I. The petitioner, however, did

not request such certification. Rather, counsel requested certification under Schedule A Group II. The regulation at 20 C.F.R. § 656.22(d) provides:

> *An employer* seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the widespread acclaim and international recognition accorded the alien by recognized experts in their field; and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) While the same phrase is used, we note that the "exceptional ability" requirements for Schedule A Group II certification are far more stringent than those for classification as alien of "exceptional ability" pursuant to section 203(b)(2) of the Act. *Compare* 8 C.F.R. § 204.5(k)(3)(ii) *with* 20 C.F.R. §§ 656.22(d)(i) *et seq*. The regulation at 8 C.F.R. § 204.5(k) provides that an alien may self-petition for the classification sought only when requesting a waiver of the job offer in the national interest. The regulations do not permit an alien to self-petition for Schedule A Group II certification. The instant petition is a self-petition by the alien and, as such, cannot seek certification under Schedule A Group II.

Had the petitioner not also requested a waiver of the labor certification process in the national interest, the petition would be deniable based solely on the fact that the alien's employer is not the petitioner. As the petitioner did request such a waiver, the only issues are whether the petitioner is an advanced degree professional or an alien of exceptional ability and whether a waiver of the labor certification process is warranted in the national interest.

Eligibility for classification pursuant to section 203(b)(2) of the Act

As quoted above, section 203(b)(2) provides for two types of classifications: advanced degree professionals and aliens of exceptional ability (as defined at 8 C.F.R. §§ 204.5(k)(2), (3)(ii), not 20 C.F.R. § 656.22(d)). The petitioner holds an engineering diploma with a major in physics from the University of Bucharest in 1985. The petitioner submitted an evaluation of this degree finding it equivalent to a baccalaureate degree in engineering physics from an accredited U.S. institution. The director did not contest that the petitioner has five years of progressive experience in that field. As noted by the director, however, the proposed employment is as a massage therapist, an occupation that does not require a degree and, thus, is not a profession. Thus, regardless of whether the petitioner's degree relates to his current occupation, we concur with the director that the petitioner is not seeking to work in the United States as an advanced degree *professional.*

The petitioner, however, seeks classification as an alien of exceptional ability. The director failed to consider whether the alien qualifies for such classification.[1] Thus, we will remand the matter to the director

[1] While the director's observation that the petitioner's degree is in a separate field is a valid consideration for the criterion set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A), an alien needs to meet only three of the six criteria. The director failed to discuss any of the other criteria. On appeal, counsel asserts that the reference letters explain the connection. Attesting to a connection is not the same thing as explaining the connection. In his own statement, the petitioner concludes that the relationship between matter and energy formulated by Einstein and the oddity that quantum physics postulates that the act of observation effects the outcome demonstrates the power of the mind over matter and the need for a "holistic approach" to medicine. He

for consideration of whether the petitioner qualifies as an alien of exceptional ability. In evaluating this claim, the director should apply the regulation at 8 C.F.R. § 204.5(k)(3)(ii), which sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. Any evidence submitted to meet these criteria must be evaluated in the context of the regulation at 8 C.F.R. § 204.5(k)(2), which defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered."

National interest waiver of the job offer

The director cited the precedent decision relating to national interest waivers, but failed to apply the test set forth in that decision. Rather, the director concluded that because the petitioner's occupation does not require a degree "the requirement of a labor certification cannot be waived." As discussed above, however, the national interest waiver is available not only to advanced degree professionals, but also aliens of exceptional ability. Thus, the fact that the petitioner is not working in a profession does not, by itself, make the waiver unavailable.

Assuming the petitioner were able to establish his eligibility as an alien of exceptional ability, and we will not make a finding of first impression on this issue, the director would then need to evaluate whether the petitioner has established that a waiver of the labor certification process, normally required for such aliens, should be waived in the national interest.

We note the following considerations. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national

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asserts that quantum physicists can explain how homeopathy can work because the diluted substances that leave no chemical trace leave an "energy imprint." The petitioner also discusses the spin state of subatomic particles, but does explain how gentle manipulation of the scalp can alter that spin or how his knowledge of that spin improves his ability as a massage therapist. The petitioner does not provide letters from prominent physicists affirming that his theories about the applicability of the quantum physics theory to medical treatment are accepted tenets of quantum physics and affirming that that quantum physics supports mind/body connections to the degree that physicians should suggest, as proposed by the petitioner, that their patients "think the cancer away."

On appeal, the petitioner submits a book by Dr. Barbara Brennan, Hands of Light: A Guide to Healing Through the Human Energy Field" that notes the discovery of quanta "energy packets" by Max Planck. The director may inquire as to how the existence of energy fields in contexts such as quantum mechanics demonstrates or implies the existence of comparable fields that directly control, or reflect, the health of a given human being. Simply mentioning physical principles, or naming particular physicists such as Albert Einstein or Max Planck, does not show that *human* "energy fields" are an accepted principle within the field of physics or medicine or are related to the cerebrospinal rhythms purportedly detected and manipulated by craniosacral therapists.

interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

In evaluating the evidence, the director should note that an increased interest in the numerous practices that fall under so-called complimentary medicine does not relieve the petitioner of providing evidence demonstrating that the benefits of his particular practice are more than speculation. For example, evidence that a given supplement may ease joint pain does not automatically establish the alleged healing properties of crystals. This office consistently refuses to recognize any distinction between the origins of medical treatments. Specifically, while we do not question the recent popularity of so-called complimentary or alternative medicine, we will not consider "traditional" or "alternative" medicine as a separate field.

> There is only scientifically proven, evidence-based medicine supported by solid data or unproven medicine, for which scientific evidence is lacking. Whether a therapeutic practice is 'Eastern' or 'Western,' is unconventional or mainstream, or involves mind-body techniques or molecular genetics is largely irrelevant except for historical purposes and cultural interest.

Fontanarosa PB, Lundberg GD, "Alternative medicine meets science," *Journal of the American Medical Association* 280: 1618-1619, 1998. This does not mean that we are "hostile" or "prejudiced" against treatments termed "alternative" or "complimentary," merely that we require the same standard of evidence

indicative of the treatment's effectiveness as we would from a researcher claiming to have developed a new cancer drug at a traditional medical research institution.

The director may take note that legislative recognition of an alternative treatment, endorsed by the governor of a state where the founder of the treatment teaches, is a political decision and does not constitute the type of rigorous peer-review to which medical treatments are normally subjected. More persuasive would be similar recognition from an independent medical body whose purpose is to investigate, not promote, particular treatments.

We note that, due to the undeniable "placebo effect," medical science does not rely on mere testimonials of benefits, even when they come from former "traditional" medical practitioners, but requires double blind tests reflecting statistically significant results. The director shall issue a notice advising the petitioner of the following studies and reports and allow the petitioner an opportunity to rebut them.

In 1994, *Physical Therapy* published an evaluation of craniosacral therapy concluding:

> Measurements of craniosacral motion did not appear to be related to measurements of heart and respiratory rates, and therapists were not able to measure it reliably.

Wirth-Pattullo, V.; Hayes, KW; "Interrater Reliability of Craniosacral Rate Measurements and Their Relationship with Subjects' and Examiners' Heart and Respiratory Rate Measurements," *Phys. Ther.* 74(10):908-16 (1994).

In 1999, the British Columbia Office of Health Technology Assessment (BCOHTA) issued a 68-page report directed at craniosacral therapy that concluded:

> The benefit of craniosacral therapy has not been demonstrated using well-designed reseach. The available studies are of low grade evidence as rated by the Canadian Task Force on Preventive Health Care ranking system, and are of poor quality when judged using standard critical appraisal criteria. Inadequacies in the studies cited above preclude any statement attesting to craniosacral therapy effectiveness.
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> Clinicians require a reliable means of assessment for decision making. Craniosacral assessment has not been shown to be reliable.
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> The literature on craniosacral therapy does not include any high grade evidence, such as random controlled trials, of its effects on health outcomes. The evidence that is available is of poor methodological quality, is highly variable, lacks consistency and does not allow any logical "positive" conclusions regarding craniosacral therapy.

(Footnotes omitted.) Kazanjian et. al., "A Systematic Review and Appraisal of the Scientific Evidence on Craniosacral Therapy," 38,40 BCOHTA May 1999. The report then acknowledges that John Upledger, the founder of this procedure, has argued against the usefulness of controlled studies using proper research

protocols, but notes that this position has been discredited by the very office whose existence counsel raises as evidence of the national significance of alternative medicine, the Office of Alternative Medicine at the National Institutes of Health (NIH). Specifically, BCOHTA cites Levin, JS; Glass, TA; Kushi, LH; Schuck, JR; Steele, L; and Jonas, WB; "Quantitative Methods in Research on Complementary and Alternative Medicine. A Methodological Manifesto," NIH Office of Alternative Medicine. Med Care 1997 Nov; 35(11):1079-94.

The relevance of the Canadian report to the United States is reflected in a citation to this article in a health digest published by the National Council Against Health Fraud. The digest notes that the BCOHTA report concluded "there is insufficient evidence to recommend craniosacral therapy to patients, practitioners, or third party payers." Digest available at www.ncahf.org/digest/01-33.html.

Finally, in 2002, a doctor of medicine and a doctor of osteopathy performed yet another evaluation of craniosacral therapy. According to the summary at the beginning of the article:

> Our own and previously published findings suggest that the proposed mechanism for cranial osteopathy is *invalid* and that interexaminer (and, therefore, diagnostic) reliability is approximately *zero*. Since *no properly randomized, blinded, and placebo-controlled outcome studies have been published*, we conclude that cranial osteopathy should be *removed from curricula* of colleges of osteopathic medicine and from osteopathic licensing examinations.

(Emphasis added.) Hartman, SE; Norton, JM, "Interexaminer Reliability and Craniosacral Osteopathy," *Scientific Review of Alternative Medicine,* 6(1):23-24 (2002).

The above reports have all been added to the record of proceedings. The petitioner should be afforded an opportunity to rebut these studies with studies conducted with similar controls and published in equally reputable medical journals supporting the claimed benefits of his theory.

We reiterate that it is the petitioner's burden to demonstrate that his therapies are beneficial as it is not in the national interest to waive the labor certification process for a therapist practicing methods that have not been demonstrated as superior to the methods of the average massage therapist or practitioners of relaxation techniques.

In light of the above, this matter will be remanded for consideration of whether the petitioner is an alien of exceptional ability and whether the labor certification process should be waived in the national interest. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, ***regardless of outcome***, is to be certified to the Administrative Appeals Office for review.